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Circumcision of Healthy Boys: Criminal Assault?

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Abstract

Although a number of Australian jurisdictions have acted to outlaw female genital cutting, equal protection under the law has not yet been afforded to unconsenting minors who happen to be boys. In light of Marion's Case (Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218), it is now evident that parents cannot provide legal consent for an irreversible, non-therapeutic circumcision. Moreover, there are no medical indications for neonatal circumcision (Australasian Association of Paediatric Surgeons, Guidelines for Circumcision (1996)). Consequently, enforced or involuntary circumcision must now be considered as an assault causing grievous bodily harm (genital mutilation). Legal action is long overdue in Australia to protect the physical and sexual integrity of male minors.

Introduction

Genital cutting of females, called circumcision or female genital mutilation, has raised outcries of horror. Proscribed by statute in New South Wales and Victoria, it is also illegal under general laws in most other States and many other jurisdictions. [1] Female genital mutilation constitutes a common law assault. [2] Any doctor who performs female genital mutilation in Australia, even with parental consent, or the consent of the female herself, is liable to prosecution, either under the legislation that specifically prohibits it in certain jurisdictions, or under the general assault provisions in common law.

Yet, to date, destructive genital cutting of males, called circumcision or male genital mutilation, has escaped concerted censure. Despite a continuing reduction over recent years, thousands of healthy Australian baby boys are circumcised annually. Medicare figures for 1997-1998 reveal almost 20,000 fee-for-service circumcisions on boys, excluding public patients and those outside the medical system. [3] While rare in Scandinavia and Europe, circumcision also is common in North America. United Kingdom circumcision rates declined dramatically once it was no longer covered by the National Health Service. The United States rate has declined from 90 to 60 per cent in recent years. In Australia, circumcision surgery is still imposed on approximately 10 to 15 per cent of healthy boys.

The general rule in English criminal law, and reflected in other common law jurisdictions, is that any application of force, no matter how slight, is *prima facie* an assault. Consent serves as a defence to assaults that do not inflict actual bodily harm. Exceptions to the general prohibition on assaults causing bodily harm include medical treatment. Lord Templeman's remark in the House of Lords case of *R v Brown* (involving consensual sadomasochism) that ritual circumcision is lawful [4] is much cited by circumcision advocates. Those who rely on Lord Templeman do not take adequate account of the difference between the *ratio decidendi* of a case and an *obiter dictum*. The English Law Commission did not cite Lord Templeman or any other case as authority. The legal effect of *R v Brown* and the English Law Commission's views has been analysed elsewhere. [5]

The Queensland Law Reform Commission, relying heavily on *Department of Health and Community Services v JWB and SMB*, [6] noted:

“The circumcision procedure is invasive, irreversible and major. It involves the removal of an otherwise healthy organ part. It has serious attendant risks.” [7]

According to the Queensland Law Reform Commission:

“The common law operating in Queensland appears to be that if a young person is unable, through lack of maturity or other disability, to give effective consent to a proposed procedure and if the

nature of the proposed treatment is invasive, irreversible and major surgery and for non-therapeutic purposes, then court approval is required... The basis of this attitude is the respect ... [for] ... an individual's bodily integrity ... unless there are immediate health benefits to a particular child from circumcision, it is unlikely that the procedure itself could be considered as therapeutic.” [8]

Is infant circumcision advantageous?

A variety of claims as to lack of pain, minimal risk, absence of harm, no ill-effect on pleasure and/or function, and so-called benefits from routine circumcision are frequently made. However, the burden of proof of substantiating these claims lies on those who would pick up a knife to amputate normal, healthy and functional anatomy (“he who avers, proves”). The medical evidence is that the claims made by circumcision advocates are controverted by the facts. Rationalisations for male genital cutting include claims about hygiene, prevention of genital cancers, urinary tract infections (UTIs), and of AIDS. However, overwhelming epidemiological evidence exists to the contrary. In its letter of 16 February 1996, representatives of the American Cancer Society stated unambiguously that circumcision should not be recommended for preventing penile or cervical cancer:

“The American Cancer Society does not consider routine circumcision to be a valid or effective measure to prevent such cancers... Research suggesting a pattern in the circumcision status of partners of women with cervical cancer is methodologically flawed, outdated, and has not been taken seriously in the medical community for decades... Penile cancer is an extremely rare condition, affecting one in 200,000 men... Perpetrating the mistaken belief that circumcision prevents cancer is inappropriate.” [9]

Furthermore, contrary to the claims of circumcision advocates, circumcision does not protect against sexually transmitted diseases such as AIDS. In fact, the United States has both the highest rate of routine circumcision and AIDS in the developed world. [10] Moreover, UTIs occur in only 1 to 2 per cent of boys, and are conservatively treated with antibiotics. Phimosis, unless it is the result of balanitis xerotica obliterans, an extremely rare condition, cannot be diagnosed prior to puberty, and then is easily treated using cortisone ointment and gentle stretching. [11] Circumcised men without the protection of a foreskin are at greater risk of many sexually transmitted diseases. [12]

Consequently, no national or international medical association in the modern industrialised world (including the American Academy of Pediatrics, the Australian Medical Association, the Australian College of Paediatrics, the Australasian Association of Paediatric Surgeons, the British Medical Association, or the Canadian Paediatric Society) [13] endorses routine infant circumcision. In March

1999 the American Academy of Pediatrics concluded that “the data are not sufficient to recommend routine neonatal circumcision”.

Nevertheless, the most recent American Academy of Pediatrics position statement on male genital mutilation failed to reflect the weight of the medical literature as to the harm of circumcision from complications and otherwise, including the damage to bodily and functional genital integrity. [14] The statement also seriously misstated the thrust of articles such as that by Øster, [15] and provided a misleading summary of purported benefits by inflating them. Its suggestion that EMLA cream is an acceptable and effective local anaesthetic for infant circumcision disregarded the manufacturer's contraindications that it not be used on genital skin or mucosa, as well as studies showing that EMLA provides only minimal pain relief. [16] Furthermore, the American Academy of Pediatrics statement provided no reasoned, or indeed any, argument for its assertion that “it is legitimate for parents to take into account cultural, religious and ethnic traditions”, and thus to subject an infant to this amputation. There is clear medical evidence of adverse effects from the pain, significant complications, and inevitable prejudice to genital function. There are no clearly demonstrable medical benefits.

Disadvantages of circumcision

During circumcision, the baby's sensitive foreskin is crushed audibly, and the raw flesh is cut with scissors. In all neonatal circumcisions, forceps or other probes are inserted into the delicate foreskin, scraping, tearing apart and destroying the normal erogenous tissues of the child's sex organ. This causes considerable pain and leaves the raw glans open to infections, with any resultant scar tissue on the glans further compromising sexual sensitivity. Tearing the normal protective adhesions between the glans and foreskin resembles ripping a fingernail from the quick. If a clamping method is used, the foreskin is crushed over a bell-shaped device, to enable amputation.

Circumcision removes 50 per cent of penile skin and thousands of specialised nerve endings, fundamental to normal sexual response. [17] The externalised glans and inner foreskin remnant become dried and skin-hardened (keratinised), further desensitising the penis, with progressive lifelong loss of sensation. [18] Reduced sexual function and pleasure has been acknowledged for centuries, though circumcision proponents expediently deny this. Indeed, Maimonides wrote in the 12th century:

“The bodily injury caused to that organ is exactly that which is desired ... there is no doubt that circumcision weakens the power of sexual excitement.” [19]

Circumcision makes the achievement of orgasm more difficult, decreases its intensity, and impedes sexual satisfaction among circumcised men and their female partners, thereby reducing or constraining both male and female sexuality. [20] Complications, including an estimated 229 deaths each year in the United States alone, [21] range up to 55 per cent depending on the definition applied, and willingness to report complications fully and accurately (for example, meatal stenosis, urethral fistula, penile necrosis, accidental amputation of part or all of the glans, skin tags). [22] Since genital integrity is always destroyed, and sexual function is always compromised, the true complication rate of circumcision is in reality 100 per cent.

One Australian paediatrician stated that he had seen two infant deaths during circumcision. “That's rare, but not to the parents of the little kid that died.” [23] In Texas, a five-year-old boy died following circumcision complications. [24] In Miami a boy bled to death after circumcision. [25] Yet another circumcision-related death recently occurred in Cleveland. [26] Sometimes, the entire penis is lost, and several boys have undergone gender reassignment (often unacceptable to the victim) resulting from this tragedy. [27] In Seattle, to save his life, one baby's penis was denuded, his scrotum completely removed, and his skin from his thighs up to his navel had to be excised to stop gangrene spreading from his circumcision wound. [28] A British man suffered “appalling injuries” to his penis from an operation to repair the defects from his circumcision. The case was settled with payment in excess of £UK800,000. [29]

Circumcision causes behavioural and neurological changes, diminished self-esteem and body image, sexual deficits, and often lifelong circumcision-related stress. [30] Many men see themselves as deformed or harmed by male genital mutilation, causing enduring psychological damage. [31] Many circumcised men suffer ongoing symptoms of post-traumatic stress disorder. [32]

Psychologically, circumcision may be perceived as aggression and castration, weakening the ego, disturbing sexual identification, and initiating regression, withdrawal and isolation. Some reported “gender differences” may arise from circumcision-induced behavioural changes. [33]

A 1997 infant circumcision pain study was abandoned because inflicting pain on unanaesthetised controls was deemed unethical. [34] Circumcision traumatises infants, who have few pain-coping mechanisms. [35] Pain may be blunted but not eliminated by local anaesthesia. [36] Pain causes irreversible changes in the developing brain, heightening pain perception. [37] Atrophy of non-stimulated neurons in the brain's pleasure centre follows severed erogenous sensory nerve endings. [38] Circumcised boys react with greater pain intensity to immunisations six months after circumcision. [39]

Involuntary circumcision violates human rights

The case against circumcision of children was strengthened by Australia's 1990 ratification of the United Nations Convention on the Rights of the Child. Ratified by every country in the world except the United States and Somalia, the United Nations Convention on the Rights of the Child safeguards the child's right to autonomy and bodily integrity - rights violated by neonatal male circumcision. Several Articles support the position that circumcision breaches fundamental human rights:

Article 19 provides that states shall take all appropriate measures "to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

Article 24(3) urges "abolishing traditional practices prejudicial to the health of children".

Article 6(2) safeguards the survival and development of the child. Article 36 protects children against all forms of exploitation prejudicial to their welfare - a right violated when biotissue corporations use foreskins harvested from unconsenting defenceless infants - to produce profitable artificial skin products. [40]

Article 37(a) in part states:

"No child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment."

The following human rights treaties applicable in Australia also prohibit male genital mutilation based on such critical rights as the right to bodily integrity, the right to freedom of religion, the right to the highest attainable standard of health, the right to protection against torture, and the right to equal protection:

Charter of the United Nations: Art 55(c);

International Covenant on Civil and Political Rights: Arts 7, 9, 18.3 and 24.1;

Universal Declaration of Human Rights: Arts 3, 5, 6, 7, 12 and 25(2);

Convention on the Rights of the Child: Arts 14.1, 14.3, 16, 24.1, 24.2, 34 and 37(b);

Convention Against Torture: Arts 2.1, 2.2, 4.1 and 4.2; and

Declaration Against Torture: Art 3.

Official acknowledgment of circumcision as a human rights violation is growing. Germany awarded political asylum to a Turkish man based on his fear of enforced circumcision:

“There may be ... no doubt that a circumcision which has taken place against the will of the person affected shows ... a violation of his physical and psychological integrity which is of significance to asylum.” [41]

Two United Nations reports recognise sexual assault on males, including circumcision, as torture and a violation of human rights. [42]

Discriminatory prohibition of female genital mutilation violates human rights

Countries which proscribe even the mildest forms of female circumcision - which may involve only a nick to the clitoris and/or excision of the female prepuce (Type 1) - but permit infant male circumcision - involving surgical amputation of the entire foreskin - are failing to provide equal protection of the right to bodily integrity for male minors. Laws against female genital mutilation, which do not simultaneously prohibit male genital mutilation, contravene principles of equal protection enshrined in human rights law. They directly conflict with Art 7 of the Universal Declaration of Human Rights, which states:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.”

Likewise, these nations contravene Art 2 of the Universal Declaration of Human Rights, Art 2 of the Convention on the Rights of the Child, and Arts 1(3), and 55(c) of the United Nations Charter. All United Nations members are bound by these and all Charter provisions. Therefore, a human rights violation occurs when males are not afforded protection from genital mutilation, a protection enjoyed by females. As in the United States, where litigation frequently challenges legislation that violates equal protection, Australian anti-discrimination legislation offers a potential weapon against male circumcision.

One frequent rationalisation for legislation addressing only female genital mutilation is the supposedly dramatic contrast in severity between female genital mutilation and male genital mutilation. However, circumcision removes a considerable area of erogenous penile skin (an area corresponding to 64 to 90 square cm in adult males), [43] causing significant damage. Human rights principles discourage the creation of hierarchies of rights and the ignoring of abuses which are placed lower in those hierarchies. Human rights principles are absolute, not subject to balancing in the scales of international justice relative to other violations. Interpretations of human rights law

which recognise female genital mutilation but not male genital mutilation as violations infringe on equal protection principles enshrined in international law.

Medical attitudes

Given the serious harm caused by circumcision and the lack of medical justification, doctors should have profound reservations about performing destructive surgery that manifestly offends the Hippocratic Oath (“First Do No Harm”). The Australasian Association of Paediatric Surgeons concluded that there are no medical indications for neonatal circumcision, and that enforced circumcision is an affront to bodily integrity. Likewise, the Australian College of Paediatrics stated that “routine circumcision may contravene human rights ... because circumcision is performed on a minor and without proven medical benefit”. [44] The New South Wales Health Commission concluded that there is “no valid medical indication for circumcision in the neonatal period”. [45]

The Nuffield Committee stated:

“Gratuitous injury, that is injury that is not undertaken in order to avoid destruction, damage or degradation, remains unacceptable. This point is sometimes blurred by an assumption that it is the therapeutic context which licenses what would otherwise be injury. In fact it is more precisely the therapeutic intent rather than the therapeutic context that justifies action that otherwise would be seen as injury... Gratuitous and in particular malicious injury of human beings, and specifically human tissue, will always be unacceptable, especially when inflicted in a therapeutic context... Treatment given by those who are medical practitioners will be acceptable only if guided by a therapeutic intention.” [46]

Notwithstanding this, some Australian medical doctors continue to benefit financially from Medicare's continued reimbursement of non-therapeutic genital cutting. Some are demonstrably vehement about continuing mutilation, raising questions as to their psychological motives.

Increasing numbers of medical personnel, however, have refused to participate in male genital mutilation, given its blatant violation of human rights. Some nurses have vowed not to participate, even if circumcision were somehow rendered painless, because it causes mutilation without the victim's informed consent. [47]

Cultural blindness

Like others, judges base their decisions in part on society's almost unconscious biases and cultural prejudices. Historically, various horrors have been overlooked by Australian authorities, including the genocide of Tasmanian Aborigines, the more or less routine sterilisation of allegedly mentally

defective adolescent girls, and the patronising policies of former governments resulting in the great problem of the “stolen generations”.

Cultural blindness worldwide has played a strong role in condoning body mutilation practices. While viewed with horror by other cultures, any mutilation is seen by the perpetrating culture as benign at worst; often it is misperceived as of positive benefit. Examples include footbinding, placing growing children in vases to shape their bones, and genital mutilation of both sexes. [48]

Growing resistance

Organised opposition to circumcision has been increasing dramatically in recent years, especially with the founding of the United States-based National Organisation to Halt the Abuse and Routine Mutilation of Males (NOHARMM). In 1993, an Australian branch of the National Organisation of Circumcision Information Resource Centres (NOCIRC) was formed with the aim of eradicating the continuing enforced circumcision of many unconsenting minors. Profession-specific organisations have been founded by physicians, nurses and lawyers, including Doctors Opposing Circumcision, Nurses for the Rights of the Child, and the United States-based Attorneys for the Rights of the Child which are all lobbying aggressively against involuntary circumcision. Pursuant to its avowed mission to help bring an end to all enforced genital cutting, Attorneys for the Rights of the Child are singling out hospitals and doctors who perform non-therapeutic circumcisions, demanding that they halt all non-medically indicated sexual surgeries on minors.

Legal actions

Every doctor has two legal duties: first, to act with reasonable care; and secondly, to obtain consent from the patient, except in a life-threatening medical emergency. Failure to obtain informed consent renders any bodily intrusion an assault. When circumcisions have resulted in litigation, the cases have been fought on the grounds of negligence or lack of informed consent.

In a 1987 New South Wales Supreme Court decision, \$A27,500 damages were awarded for psychological harm caused by a negligently performed circumcision. In dismissing the defendant's appeal against the amount of the award, McHugh JA stated:

“In a society where sexuality is the subject of one of its dominant discourses, the plaintiff's perception of himself as sexually deformed and inadequate would ultimately force him to retreat from most, if not all, forms of social intercourse.” [49]

In December 1999, a Western Australian doctor agreed to pay \$A360,000 plus legal costs for performing an unnecessary routine neonatal circumcision which caused permanent physical and sexual harm and resultant psychological trauma. [50]

Also, action has been based on lack of informed consent. In Alabama, a newborn was circumcised against his mother's wishes, resulting in a verdict of US\$65,000, and a similar case in New York is currently the subject of litigation. [51]

The Australasian Association of Paediatric Surgeons has issued guidelines regarding consent. [52] Parents should have explained to them inherent risks and possible complications, such as severe pain, meatal stenosis, penile necrosis, lifelong sexual dysfunction, brain damage, and even death. The Queensland Law Reform Commission has warned that parents should be informed of all arguments relating to circumcision several days before the destructive surgical amputation. [53] It is highly unlikely that medical personnel comply with even this minimal mandate. This has very grave implications, as once the foreskin with its thousands of erogenous nerve endings and exquisitely sensitive frenulum has been severed, it can never be replaced. The infant victim has no say in the matter, and is forced to live with the adverse physical, reduced sexual, and psychological/post-traumatic stress disorder consequences for the remainder of his life.

Grave doubt exists whether parental consent to a routine circumcision has ever been truly informed. Medical doctors rarely provide full information of all complications which may follow circumcision, and some explicitly advocate non-therapeutic circumcision. The American Academy of Pediatrics has recommended that information conveyed to parents include: the provision of information, with explanations in understandable language, concerning the nature of the condition, the nature of the proposed "treatment", the possibility of success, the nature of the risks, and the potential benefits and risks of alternative treatment, including no treatment at all;

the assessment of parents' understanding of the information;

the assessment of parents' capacity to make the appropriate decision; and

the assessment that there is freedom of choice, without coercion or manipulation.

Compliance requires that full information be provided and that no pressure be placed on parents to assent to a circumcision. Doctors have a duty of care to inform parents fully of all risks and potential harmful effects. Failing to tell parents about the erogenous function of the foreskin is a serious act of omission. The minimum that doctors must tell parents is listed in the document entitled Informed Consent for Medically Necessary Circumcision. [54] This document, drafted by Illinois medical practitioner Eileen Wayne, MD, not only outlines the erogenous function of the foreskin, but also

draws attention to the extremely rare reasons for medically necessary circumcision (never applicable during infancy). It outlines the “reasons” advocated for medically unnecessary circumcision (most circumcisions are medically unnecessary); the anatomy and functions of the foreskin (including sexual pleasure, lubricating, and gliding action); circumcision procedures; curable foreskin conditions; risks of circumcision (both short-term and long-term); ethical and legal considerations of enforced circumcision on unconsenting minors; and, finally, signed permission forms. It is clear from this ethically conceived document that parents can never give legal consent for medically unnecessary circumcisions on children.

Even in the absence of legislation specifically banning circumcision, those who assist in the circumcision of a child without the patient's own fully informed consent are liable to prosecution.

According to Price:

“Lawyers in common law jurisdictions (England, the United States, Canada and Australia) have expressed the view that ... non-therapeutic circumcision is, or at the very least is *prima facie*, a criminal assault ... there has been no rebuttal of that view.” [55]

The Queensland Law Reform Commission indicated that parents who permit medically unnecessary surgery that is invasive, irreversible and major (such as circumcision is) on an unconsenting minor may be liable. [56] One authority on medical jurisprudence concluded:

“Once it is shown that a child has been subject to an injury to his sexual organ without medical integrity, a case may be made for enforcement of existing laws prohibiting assault and battery, conspiracy to assault and battery, child abuse, and sexual abuse.” [57]

Parents cannot consent to non-therapeutic medical procedures

Given international instruments and domestic common law principles and case law, grave doubt exists as to whether even a truly informed parent can consent to the non-therapeutic circumcision of a child. [58] While English courts acknowledge parental views and religious beliefs, these can be overridden by the objective interests of the child. [59]

Under the Convention on the Rights of the Child, Art 12, any child capable of forming his or her own views has the right to express those views freely in all matters affecting him or her, and for those views to be given due weight in accordance with age and maturity. Newborn babies cannot express a view on whether they should be circumcised. Circumcising children removes their choice for all time. Notably, the Human Tissue Act 1983 (NSW) explicitly recognised the child's right to withhold consent for any proposed removal and transplantation of a child's tissue(s). [60]

Unless a medical procedure is necessary to preserve life or health, it should be postponed until the child is sufficiently mature to make a decision for himself or herself. If the child is incapable, because of intellectual disability, of making an informed decision, then under Marion's Case (involuntary hysterectomy of an intellectually handicapped 14-year-old girl), the consent of the Family Court or court exercising parens patriae jurisdiction, and in some cases a State or Territory statutory guardianship body, is necessary. [61] Wherever proposed treatment is not unequivocally beneficial to the child, parental assent is insufficient.

The Bioethics Committee of the American Academy of Pediatrics emphasised that the power to consent to a procedure rests solely with patients:

“Only patients who have appropriate decisional capacity and legal empowerment can give their informed consent to medical care. In all other situations, parents or other surrogates provide informed permission for diagnosis and treatment of children with the assent of the child whenever appropriate.” [62]

They also concluded:

“Thus, ‘proxy consent’ poses serious problems for pediatric health care providers. Such providers have legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses.” [63]

Conclusion

Reasons for concern about infant male circumcision under human rights principles include:

the loss of highly erogenous sexual tissue which also serves important protective functions;

the loss of bodily integrity;

traumatic and often highly painful disfigurement;

complications including death and the loss of the entire penis; [64] and

the impermissibility of any mutilation of children's genitals performed with neither their consent nor medical justification.

No national or international medical association in the modern industrialised world, or indeed anywhere in the world, endorses routine circumcision of healthy boys.

Several human rights documents tacitly forbid enforced infant circumcision. Non-therapeutic circumcision of unconsenting minors amounts to culturally sanctioned physical and sexual abuse. No

basis in international human rights law or domestic law justifies the discriminatory prohibition of only female genital mutilation.

“Ritual male circumcision is non-therapeutic and is not warranted or justified by medical evidence. This form of mutilation should not be legally distinguished from female circumcision ... presently being prohibited throughout Australia and the Western world. As ritual male circumcision is non-therapeutic, may be against public policy, and clearly is not in the best interests of the child, a parent's consent may be vitiated, leaving persons involved in the procedure liable in negligence, notwithstanding parental religious beliefs.” [65]

Non-therapeutic, invasive and irreversible major surgery, especially sexual reduction surgery on unconsenting minors, is unethical. The standard of care for infrequent events such as infections is antibiotics, not amputation. Circumcision of healthy male minors is useless and traumatic, causing severe and lasting harm physically, sexually and often psychologically. As medical ethicist Margaret Somerville pointed out:

“Moreover, neonatal circumcision is done without consent of the subject, removes healthy tissue with unique anatomical structure and function, and leads to differences in adult sexual behaviour... We need, therefore, to address the issue directly and end the persistent efforts to find a medical rationale for circumcision by removing the cloak of medicine from this procedure. [66]”

Enforced non-therapeutic genital cutting of unconsenting minors is overdue for recognition by the legal community as sexual mutilation. [67] As we enter the 21st Century, appropriate legal action must be taken to safeguard the physical genital integrity of male children.

* The authors gratefully acknowledge the assistance of Tim Hammond, Director, National Organisation to Halt the Abuse and Routine Mutilation of Males (NOHARMM), PO Box 460795, San Francisco, CA 94146, United States of America.

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